Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW. Petitioner is wholly owned by Sonic Automotive, Inc., a publicly held company. Sonic Automotive, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Christine Watts, Natalie Armstrong, Michael Blease, Alison Dannert, Julie Freeman, Heather Herron, Michael Ritz, and Michael Watts.

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PETITION FOR A WRIT OF CERTIORARI

Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App., *infra*, 1a-12a) is reported at 693 S.E.2d 394. The South Carolina Supreme Court's order denying rehearing (App., *infra*, 13a-15a) and the trial court's order denying petitioner's motion to compel arbitration (App., *infra*, 16a-29a) are unreported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 19, 2010. A petition for rehearing was denied on June 9, 2010 (App., *infra*, 13a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

1. Petitioner is an automobile dealer in Greenville, South Carolina. In 2005, respondent Christine Watts, accompanied by her father, purchased a 2004 BMW Z4 convertible from petitioner. In the course of doing so, Watts executed an arbitration agreement. Under the terms of that agreement, which was expressly governed by the Federal Arbitration Act (FAA), any dispute between the parties would be subject to arbitration. At Watts's option, the arbitration would take place either in the federal district in which she resided or in the district in which the car was purchased. If Watts initiated the

claim, petitioner agreed to pay the portion of the filing fee that exceeded the amount she would have had to pay if the claim had been filed in court; under the agreement and the underlying rules governing the arbitration, petitioner also agreed to pay the arbitrator's fees. Of critical relevance here, the arbitration agreement provided that the parties "waiv[ed] their right to * * * bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." App., *infra*, 7a-8a; S.C. C.A. App. 94, 136, 659-666, 1100; Pet. S.C. C.A. Br. 1-7.

2. On October 31, 2006, respondents, including Watts, filed a class action in South Carolina state court against petitioner and more than 300 other automobile dealers. S.C. C.A. App. 68-147. They contended, *inter alia*, that the dealers had improperly charged "administrative fees" in connection with the sale of vehicles in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009).[1]

Pursuant to the terms of the arbitration agreement, petitioner moved to compel arbitration of Watts's claim. The trial court denied the motion. App., *infra*, 16a-29a. The court held that the arbitration agreement was "unconscionable and unenforceable" on the grounds that "[respondent] Watts had an absence of meaningful choice when she entered into the arbitration agreement" and that "[t]he Century BMW arbitration agreement

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[1] Because the other respondents besides Watts all purchased vehicles from other dealers besides petitioner, they were nominal parties in the court below and are nominal parties here. See S.C. C.A. App. 135-136.

contains oppressive and one-sided terms." *Id.* at 24a, 28a.

3. Petitioner appealed to the South Carolina Court of Appeals, contending, *inter alia*, that the trial court's order "violated the federal policy favoring arbitration." Pet. S.C. C.A. Br. 11. The South Carolina Supreme Court *sua sponte* certified the appeal for its own review and then affirmed in result. App., *infra*, 1a-12a. As a preliminary matter, the South Carolina Supreme Court agreed with petitioner that the trial court had erred in holding that the arbitration agreement as a whole was unconscionable. *Id.* at 5a-8a. The court first determined that respondent Watts "had a meaningful choice in signing the [arbitration agreement]," because the agreement was "a separate, one-page document" that was "clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font." *Id.* at 6a. The court further determined that most of the terms of the arbitration agreement were "neither oppressive nor one-sided," because "[s]everal provisions favor the customer" and "nothing in the agreement prevents the arbitrator from awarding punitive damages or * * * limit[s] any available statutory remedies." *Id.* at 8a.

The South Carolina Supreme Court nevertheless held that the provision of the arbitration agreement precluding the availability of class arbitration was invalid on a ground not advanced by respondent Watts: *viz.*, because it violated a provision of the Dealers Act allowing Dealers Act claims to be brought as class actions. See App., *infra*, 9a-10a (citing S.C. Code Ann. § 56-15-110(2) (2009)). Although the provision at issue did not state that the right to file a class action was non-waivable, the court concluded that "the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits

for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." *Id.* at 10a. Because counsel for petitioner had stated at oral argument that petitioner would prefer not to arbitrate rather than to proceed with class arbitration, and because respondent had indicated her desire to "avoid the arbitration agreement and proceed in court," the court invalidated the arbitration agreement in full and therefore affirmed the denial of the motion to compel arbitration. *Id.* at 11a.

4. Shortly after the South Carolina Supreme Court's decision, this Court issued its decision in *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that it would be inconsistent with the FAA for an arbitrator to impose class arbitration on parties who had not agreed to authorize it. Petitioner filed a petition for rehearing, contending, *inter alia*, that *Stolt-Nielsen* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration. See S.C. S. Ct. Pet. for Reh'g 3 (asserting that "[t]he FAA clearly preempts South Carolina law, as this Court construed it").

The South Carolina Supreme Court denied the petition. App., *infra*, 13a-15a. The court did not expressly address petitioner's preemption argument, other than to state that *Stolt-Nielsen* was "distinguishable on the law and the facts." *Id.* at 15a. Instead, the court simply reiterated that "[its] opinion affirming the trial court's denial of the motion to compel arbitration [was] wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer[s] Act and the public policy of this State." *Ibid.* Although the court had held that the provision of the arbitration agreement precluding the availability of class

arbitration was invalid, the court asserted that it had "not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration." *Ibid.*

REASONS FOR GRANTING THE PETITION

In the decision below, the South Carolina Supreme Court held that, notwithstanding the Federal Arbitration Act, state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. After petitioner filed its petition for rehearing in the South Carolina Supreme Court, this Court granted the petition for certiorari in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893 (May 24, 2010), which presents the question whether the FAA preempts a state-law rule—there, a rule derived from the common-law doctrine of unconscionability—that conditions the enforceability of an arbitration agreement on the availability of class arbitration. Because the question presented in this case is materially identical to the question presented in *AT&T Mobility*, the petition in this case should be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

1. In *AT&T Mobility*, as in this case, the defendant moved to compel arbitration based on an arbitration provision that contained a prohibition on class arbitration; the plaintiff opposed the motion on the ground that the arbitration provision was unconscionable under state law. See Pet. App. at 3a-4a, *AT&T Mobility*, *supra*. The Ninth Circuit upheld the district court's denial of the motion to compel arbitration, holding, first, that the arbitration provision was unconscionable because it was effectively exculpatory, see *id.* at 11a, and second, that the resulting state-law rule was not preempted by the FAA

because it was "simply a refinement of the unconscionability analysis applicable to contracts generally in California," *id.* at 12a-13a. Although this Court's intervening decision in *Stolt-Nielsen* strongly suggested that the Ninth Circuit's decision was incorrect, the Court granted the petition in *AT&T Mobility* and set the case for briefing and oral argument.

2. The South Carolina Supreme Court's decision in this case is erroneous for largely the same reasons as the Ninth Circuit's decision in *AT&T Mobility*. In each case, the practical effect of the lower court's decision is the same: *viz.*, to render it impossible, as a matter of state law, for parties to agree to commit claims to bilateral arbitration (and thereby to preclude plaintiffs from pursuing claims on behalf of unnamed third parties). Various provisions of the FAA—including, most notably, Section 2—make clear that there is a strong federal policy to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotation marks and citation omitted). To be sure, Section 2 contains a narrow exception under which courts may invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As in *AT&T Mobility*, however, the state-law rule at issue here does not qualify as a valid ground for invoking that exception because it is aimed specifically at dispute-resolution agreements. See Pet. Br. at 26-48, *AT&T Mobility*, *supra*. The state-law rule is also preempted because it conflicts with broader policies animating the FAA: *viz.*, the federal policies of removing impediments to arbitration

and allowing parties to select their own dispute-resolution mechanisms. See *id.* at 49-56.[2]

3. Given the substantial overlap between the questions presented in this case and in *AT&T Mobility*, the Court should hold the petition in this case pending its disposition of *AT&T Mobility*. Should the Court hold in *AT&T Mobility* that the state-law rule at issue is preempted, there would be no valid basis for reaching a different conclusion in this case. The appropriate course would therefore be for the Court to vacate the judgment below and remand, so as to allow the South Carolina state courts to compel arbitration of respondent's claims.

Conversely, even if the Court were to affirm in *AT&T Mobility*, it may still be appropriate for the Court to vacate and remand in this case, depending on the reasoning the Court uses in reaching that result. This case presents a more compelling case for federal preemption than *AT&T Mobility* in one potentially significant re-

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[2] Relying on this Court's recent decision in *Stolt-Nielsen*, petitioner advanced its preemption argument as one of its primary bases for rehearing in the South Carolina Supreme Court. See, *e.g.*, S.C. S. Ct. Pet. for Reh'g 3. Curiously, in its order denying rehearing, the South Carolina Supreme Court did not expressly address that argument, beyond its apodictic statement that *Stolt-Nielsen* was "distinguishable on the law and the facts." App., *infra*, 15a. Instead, it stated that, in its earlier opinion, it had "not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration." *Ibid.* That statement, however, is utterly bewildering in light of the court's earlier opinion. There, the court squarely and unambiguously held that, in light of the invalidity of the prohibition against classwide arbitration, the only possible remedies were to sever the prohibition (and thereby permit respondent Watts to pursue classwide arbitration) or, as the court ultimately did, to invalidate the arbitration agreement entirely. See *id.* at 10a-12a.

spect. Unlike the state-law rule invalidating provisions requiring bilateral arbitration in *AT&T Mobility*—which was at least purportedly derived from the generally applicable common-law doctrine of unconscionability, see Pet. App. at 12a-13a, *AT&T Mobility*, *supra*—the South Carolina Supreme Court *refused* to derive its state-law rule from that doctrine, and instead relied on a novel interpretation of a provision of the South Carolina Dealers Act. See App., *infra*, 9a-10a. Under that interpretation, the provision invalidates provisions prohibiting class treatment only of a *specific class* of claims against automobile dealers (whether in arbitration or in litigation). See *ibid.* Should the Court conclude in *AT&T Mobility*, therefore, that the state-law rule at issue qualifies for the exception to preemption in Section 2 of the FAA for cases involving generally applicable principles of contract law, it would still be appropriate for the Court to vacate the judgment below and remand, because the Court's reasoning in *AT&T Mobility* would not necessarily dictate the outcome here.

In either event, it is clear that the decision in *AT&T Mobility* will have a direct and potentially dispositive effect on the preemption argument presented in this case. For that reason, consistent with the Court's ordinary practice, a hold for *AT&T Mobility* is warranted.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, and then disposed of accordingly.

Respectfully submitted.

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APPENDIX

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APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

No. 26805

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHO PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC., A/K/A GALEANA CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP A/K/A HENDRICK HONDA; OVERLAND, INC., D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; AND TOYOTA OF GREENVILLE, INC. ET AL., Defendants,
of whom CENTURY BMW A/K/A SONIC AUTOMOTIVE, Appellant.

Heard Jan. 20, 2010
Decided April 19, 2010
Rehearing Denied June 9, 2010

Before TOAL, Chief Judge, BEATTY, and HEARN, Justices, and MOORE, Acting Justice.

KITTREDGE, Justice.

This case concerns the enforceability of an arbitration agreement. Respondents Christine and Michael Watts entered into a contract with Appellant Century BMW (Century) for the purchase of a car. The transaction included the execution of an arbitration agreement. Subsequently, the Wattses filed a class action suit against Century alleging the dealership had charged illegal administrative fees. Century moved to compel arbitration. The trial court found the arbitration agreement was unconscionable and unenforceable and denied the motion to compel. Century appealed, and we granted certification pursuant to Rule 204, SCACR.

We hold the arbitration agreement, although an adhesion contract, is not unconscionable. Yet the arbitration provision prohibiting class actions is against public policy, which would ordinarily be severed pursuant to the agreement's severance clause. Century has insisted, however, that if the class action prohibition provision is unenforceable, it will abandon the balance of its rights under the arbitration agreement and consent to the action proceeding in the trial court. Although the arbitration agreement is otherwise enforceable, in accordance with Century's request, we affirm in result the trial court's order denying the motion to compel arbitration.

I.

In 2005, Michael Watts began looking for a car to purchase for his daughter, Christine Watts, as a graduation present. He negotiated with Century for the sale of a 2004 BMW Z4 convertible. Michael gave Century a bottom line price of $32,000, which Century initially re-

jected, but ultimately accepted. On the day of sale, Century presented a packet of documents Michael and Christine were to sign. Within the packet was a document titled "***ARBITRATION AGREEMENT.***" The arbitration agreement provided that any dispute between the parties would be subject to arbitration[1] and that the agreement was governed by the Federal Arbitration Act (FAA). The agreement further provided that the parties were waiving their right to bring or participate in a class action suit.

The Wattses brought a class action suit against Century and numerous other car dealerships in South Carolina, alleging the dealers charged an illegal administrative fee in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"). S.C.Code Ann. § 56-15-10 *et seq.* (2005). Century filed a motion to compel arbitration pursuant to the terms of the agreement. Relying heavily on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the trial court found the arbitration agreement was unconscionable because there was an absence of a meaningful choice and the agreement contained oppressive and one-sided terms. Accordingly, the trial court found the arbitration agreement was unenforceable and denied Century's motion to compel.

II.

A.

Arbitration

The question of arbitrability of a claim is an issue for the courts. *Partain v. Upstate Automotive Group,* 386 S.C. 488, 689 S.E.2d 602 (2010) (Shearouse Adv. Sh. No.

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[1] The Wattses have never contended that this dispute is not within the scope of the arbitration agreement.

6 at 28). The determination of whether a claim is subject to arbitration is subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

At the outset, we recognize that there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996)). To this end, if a court as a matter of law finds any clause of a contract involving the sale of goods to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

B.

Adhesion Contract

The Wattses and Century dispute whether this contract is an adhesion contract. Century argues the transaction was thoroughly negotiated and the sale was not conditioned upon the Wattses agreeing to sign the arbitration agreement. The Wattses, on the other hand, argue there is evidence to support the trial court's finding that this was an adhesion contract, including the fact that this was a standard form contract. It appears that one customer (and certainly no more than a few customers) out of approximately six thousand failed to sign the arbitration agreement.

We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis. The Wattses did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the contract.[2] *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, although this Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism," adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. Finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902.

C.

Unconscionability

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

1. Absence of Meaningful Choice

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *Id.* at 25, 644

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[2] Although the Wattses negotiated the *price of the car*, they did not have the power to negotiate the *terms of the contract*.

S.E.2d at 669. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

. We are firmly convinced and find the Wattses had a meaningful choice in signing the contract. We recognize that this was a contract for the sale of a vehicle Christine Watts planned to use as her primary means of transportation, "which is critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. We also recognize that there was an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity.[3] However, the arbitration agreement is a separate, one-page document which both Michael and Christine Watts signed. It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line.

The Wattses both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the Wattses to invalidate the enforceability of the arbitration agreement by claim-

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[3] Contrary to Century's assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was "highly-educated." These factors do not change the "consumer/business nature" of the transaction.

ing they did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.").

This arbitration agreement and the actions of Century surrounding the transaction are markedly different from the actual agreement as well as surrounding circumstances in *Simpson*. The *Simpson* arbitration agreement was inconspicuously buried in the sales contract, on the opposite page from the customer's signature, in paragraph "10" of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was "hastily" presented for her signature.

The significant features that impacted the unconscionability determination in *Simpson* are not present here. We hold the Wattses had a meaningful choice in making the decision to enter into this contract with Century.

2. Oppressive One-Sided Terms

First, we will address the provisions in the arbitration agreement, save for the provision prohibiting a customer from bringing a class action suit against Century.

Under the agreement, all claims must be brought within the applicable statute of limitations, the arbitrator shall be an attorney or retired judge, and each party is responsible for his or her own attorney's fees. Additional terms include: no arbitration is required if the claim is brought in small claims court; the arbitration shall be conducted, at the customer's option, in the federal district in which the customer resides or in which the vehicle was purchased; the arbitrator shall apply governing local, state or federal laws and award damages or other relief allowed by such governing laws; if the customer

initiates a claim, Century will pay the portion of the filing fee which exceeds the court filing fee; if Century initiates the claim, it will pay the entire filing fee; Century will pay up to $1,500 of the arbitrator's fees; and parties shall equally share fees in excess of $1,500.

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer, such as allowing the customer a choice of venue and Century's obligation to pay certain fees. Moreover, both the customer and Century are subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson*. In *Simpson*, the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitratable disputes.[4]

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[4] The Court found the scope of the arbitration agreement was broad enough to implicate claims arising under the Magnuson-Moss

3. Ban on Class Actions

Finding the terms in the arbitration agreement not to be oppressive or one-sided, we next turn to the provision banning class action suits. This provision provides: "By entering into this Agreement the Parties are waiving their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." The Wattses argue this provision is unenforceable because it is oppressive in that it takes away statutory rights, and it is one-sided in that Century would not bring a class action suit against its customers. While we agree with the Wattses that the provision is unenforceable, we hold the ban on class actions is unenforceable on public policy grounds.

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Warranty Act (MMWA), a federal statute that governs warranties on consumer products. The Court noted that federal regulations state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). Accordingly, the Court held "the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy." *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable. We note that courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (highlighting the split in authority with a list of nationwide cases finding class action waivers enforceable and unenforceable). We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

4. Severance

Finding this provision unenforceable would normally not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce

the remaining terms.[5] The parties' arbitration agreement provides that "[i]f any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable."

Nevertheless, counsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole. Obviously, the Wattses seek to avoid the arbitration agreement and proceed in court. We will not provide a remedy that neither party seeks. We treat the issue of severability as abandoned. Therefore, we decline to enforce the arbitration agreement and affirm in result the trial court's denial of Century's motion to compel arbitration.

III.

We hold, except for the provision prohibiting customers from bringing class actions, the arbitration agreement is not unconscionable, for the Wattses had a meaningful choice in entering this agreement and the agreement does not contain oppressive or one-sided terms. The arbitration agreement is enforceable except for the ban on class actions, which, under ordinary circumstances, would be severed. However, Century has abandoned its right to severance and seeks to litigate this matter in court if the ban on class actions is unenfor-

---

[5] A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent. *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

ceable. Accordingly, we affirm in result the trial court's order denying the motion to compel arbitration.

AFFIRMED IN RESULT.

APPENDIX B

SUPREME COURT OF SOUTH CAROLINA

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHO PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC., A/K/A GALEANA CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP A/K/A HENDRICK HONDA; OVERLAND, INC., D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS, AND TOYOTA OF GREENVILLE, INC. ET AL., Defendants,
of whom CENTURY BMW A/K/A SONIC AUTOMOTIVE, Appellant.

June 9, 2010

ORDER

Before TOAL, Chief Justice; BEATTY, HEARN, and KITTREDGE, Justices; and MOORE, Acting Justice.

On April 19, 2010, we issued our opinion in *Herron v. Century BMW*, Shearouse Adv. Sh. No. 15 at 14 (April 19, 2010), in which we affirmed the trial court's denial of Century's motion to compel arbitration. Although we found the arbitration agreement was not unconscionable, we held the provision banning class actions was invalid on state law grounds.

Specifically, we held:

> [T]he Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Although the arbitration agreement contained a severance clause, at oral argument, counsel for Century adamantly insisted it was their position that the severance clause not be invoked to sever the provision and repeatedly requested the Court to consider the arbitration as a whole. In honoring Century's position and request, we held the inclusion of the provision banning class action suits rendered the arbitration agreement unenforceable.

Eight days after we issued our opinion, the United States Supreme Court issued *Stolt-Nielsen* S.A. v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), in which the Supreme Court held a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Century has now filed a petition for rehearing. Century asserts "[t]his Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration," and

argues such a holding is contrary to the holding in *Stolt-Nielsen*.

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State. Although we would have looked to the severance clause of the agreement to sever this invalid provision, Century unequivocally insisted we consider the arbitration agreement as a whole, which we did. Century's attempt to depict our opinion as holding "that Century BMW could not arbitrate unless it did so as part of a class arbitration" is disingenuous to the opinion and a holding we never made. We did not condition the enforcement of the arbitration agreement on the availability of class arbitration or otherwise indicate the plaintiffs could proceed as a class in arbitration. This case is not controlled by *Stolt-Nielsen*, for is distinguishable on the law and the facts.

For these reasons, we deny Century's petition for rehearing.

IT IS SO ORDERED.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

No. 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHOM PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Plaintiffs,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC. A/K/A GAJEANA CHRYSLER JEEP, INC.; .T.L.H. INVESTMENTS, LP A/K/A HENDRICKS HONDA; OVERLAND, INC. D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; AND TOYOTA OF GREENVILLE, INC., ET. AL., Defendants.

March 10, 2008

ORDER DENYING MOTION TO COMPEL ARBITRATION

EARLY, Circuit Court Judge.

This matter comes before the Court by way of Century BMW a/k/a Sonic Automotive's ("Century BMW's") Motion to Compel Arbitration. This motion was argued before me on November 30, 2007. After considering the parties' filings, as well as the memoranda and legal arguments of counsel, I have determined that the Motion to Compel Arbitration should be denied.

FACTUAL BACKGROUND

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. The vehicle was a graduation present for Ms. Watts. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a cubicle to sign paperwork. Christine Watts in her affidavit stated that the documents were "hastily presented." Century BMW refers to this process as "rolling out the paper."

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. Century BMW's General Manager testified that it was the F&I manager's custom to place his finger on the individual documents pointing to the place on the documents that needed to be signed and say "sign here."

The Wattses signed multiple documents. Some of the documents were required to be signed by law.

The arbitration agreement at issue was one of the documents included in the packet. This arbitration

agreement is a form contract drafted by Century BMW. The arbitration agreement uses a small font.

The Wattses say there was no discussion with the F&I manager about the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." The Wattses also testified that believed that they were required to sign all of the documents in order to get the car.

On October 31, 2006, Plaintiff Watts initiated the current action against Defendant Century BMW. In the Amended Complaint, Plaintiff Watts alleged causes of action for a declaratory judgment, civil conspiracy, and violation of the Motor Vehicle Dealers Act. On December 29, 2006, Defendant Century BMW filed a motion to compel arbitration.

ANALYSIS

The Plaintiff and Defendant agree that *Simpson v. MSA of Myrtle Beach Inc.*, 644 S.E.2d 663 (S.C. 2007) is the controlling authority for this motion. The *Simpson* Court held that a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. *Simpson*, 644 S.E.2d at 668-671. Application of the *Simpson* test here shows that the Century BMW arbitration agreement is also unconscionable and unenforceable.

A. The Century BMW Arbitration is an Adhesion Contract.

The Century BMW arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 644 S.E.2d at

669. Adhesion contracts "are standard in the automobile retail industry." *Id.*

The arbitration agreement here is a standard form contract drafted by Century BMW. The contract has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership. Plaintiff Watts did not participate in the drafting of the agreement and had no voice in the formulation of its terms.

Century BMW presents the arbitration agreement on a take-it-or-leave-it basis. Century BMW's procedures and method of presentation lead to the conclusion that the arbitration agreement must be signed to purchase the car. Century BMW's General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to on the paper to where the customer was supposed to sign and say "sign here." Century BMW had no standard statements to tell purchasers. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer in this case.

The agreement is a standard form contract. Century BMW's procedures and the Watts's testimony[1] show that

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[1] The Wattses' testimony is the only testimony about the events surrounding the execution of the agreement. The Wattses testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction.

the terms of the arbitration agreement were not negotiable. Accordingly, I find that the arbitration agreement is an adhesion contract. Because the Century BMW arbitration agreement is an adhesion contract, the Century BMW arbitration agreement should be viewed with "considerable skepticism." *Simpson*, 644 S.E.2d at 670 (adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating "We . . . proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism'.").

B. Absence of Meaningful Choice.

I also find that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action. The *Simpson* case describes absence of meaningful choice as follows:

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach Inc., 644 S.E.2d 663 (internal citation omitted).

Because an automobile is a "necessity" in everyday life, the *Simpson* Court found this factor should be con-

sidered in determining "whether a consumer had a meaningful choice in negotiating the arbitration agreement." *Simpson*, 644 S.E.2d at 669.

Applying this analysis, the *Simpson* Court provided as follow:

> [T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modem day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson's allegation that the contract was "hastily" presented for her signature.

Simpson, 644 S.E.2d at 670. The facts here support a finding of an absence of meaningful choice by the Plaintiffs.

There was a clear disparity in the parties' bargaining power and the relative sophistication between the parties. Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston. Michael Watts sold garage doors. The Wattses did not have any attorney present when they signed the agreement. The Plain-

tiffs were not sophisticated and obviously not substantial business concerns.

Century BMW, on the other hand, is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. Sonic Automotive, Inc. drafted the arbitration agreement and had engaged in thousands of transactions where arbitration clauses were used. Sonic was a sophisticated car dealer with years of arbitration clause use. I find that there was a disparity of bargaining power between the parties.

Additionally, there was unfairness in the bargaining process. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager point on each document (whether required to be signed by law or not) and say sign here. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. *Simpson*, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

The Watts stated that there was no discussion of the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." This statement, if given by Century BMW, is sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights. The lack of a Cen-

tury BMW full explanation is further evidence showing the fundamental unfairness of the bargaining process.

There was also an element of surprise involved in the inclusion of the arbitration agreement because none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. Similarly, Century BMW's General Manager and F&I manager did not have much understanding of the arbitration agreement nor how it worked.

Century BMW's argument that the bargaining process was fair because the Wattses could have read the arbitration agreement is non-availing. The Plaintiff in *Simpson* also could have read the arbitration agreement at issue in that case. Additionally, even if the Wattses had read the arbitration agreement, the bargaining process was unfair because the arbitration agreement was not easily understandable.

Century BMW's Rule 30(b)(6) representative as the person most knowledgeable on the arbitration agreement testified that he did not have much understanding of how the arbitration agreement worked. Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not have much understanding of the agreement. It is unfair to expect the Wattses to understand the agreement, when in a little cubicle with the F&I Manager with his finger on the document pointing to the place to sign.

I also find that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary

source of transportation and was purchased so that she could get back and forth from work. Century BMW argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero. The fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. The plaintiff in *Simpson*, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. *Simpson*, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in *Simpson*, was purchased to be her primary source of transportation. As such, I find that the use of the car was a necessity.

In the end, I find that the facts in this case are similar to those in *Simpson*. These facts, just as they did in Simpson, warrant a finding that Plaintiff Watts had an absence of meaningful choice when she entered into the arbitration agreement.[2]

C. One-Sided and Oppressive Terms.

The Century BMW arbitration agreement contains oppressive and one-sided terms. In analyzing this factor, the *Simpson* Court stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 631 S.C. at 555, 606 S.E.2d at

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[2] In addition to *Simpson*, the North Carolina Supreme Court's decision in *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) also supports a finding that the arbitration agreement here is unenforceable.

> 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671 (citing the "strong public policy notions behind the enactment of the . . . Dealers Act."). The *Simpson* case reasoning is equally applicable here.

One-Sided Terms

The prohibition of multi-plaintiff and class action in the Century BMW arbitration agreement is one-sided. Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. *See Kinkel v. Cingular Wireless. LLC*, 828 N.E.2d 812, 820-821 (Ill. App. 5 Dist. 2005)("cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitration is a one-sided limitation on its customers' ability to seek relief . . . such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconsciona-

ble."). *See also Szetela v. Discover Bank*, 97 Cal.App. 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because "credit card companies typically do not sue their customers in class action lawsuits."). Clearly, the Century BMW arbitration agreement contains one-sided terms.

Oppressive Terms

The arbitration agreement contains oppressive terms that violate public policy and statutory law. The Century BMW arbitration agreement here, like the arbitration agreement in *Simpson*, attempts to take away Plaintiff Watts's statutory rights. The Dealers Act provides substantive rights to those harmed by violations. S.C. Code Ann. §56-15-110(2) provides:

> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole. Including actions for injunctive relief.

S.C. Code Ann. §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group. The statute was "[o]bviously enacted . . . because consumers' remedies at common law were deemed inadequate." *See Kucharski v. Rick Hendrick Chevrolet, LP*, 2002 WL 313860990 (S.C. Ct. App. 2002). As stated by the Supreme Court in *Simpson*, the purpose behind the Dealers Act is to "punish[ ] acts that adversely affect the public interest." *Simpson*, 644 S.E.2d at 671.

The Century BMW arbitration agreement's attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statuto-

ry rights in arbitration. The right to bring a claim on behalf of a group under S.C. Code Ann. §56-15-110(2) is significant. This protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law. S.C. Code Ann. §56-15-110 makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. Century BMW's attempt to take this right away is violative public policy.

Similarly, Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek *group injunctive relief*, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century BMW arbitration Agreement. S.C. Code Ann. §56-15-110(2) is designed so that one person can stop a car dealers from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right that cannot be vindicated in the Century BMW arbitration agreement.

Courts in other jurisdictions have found similar provisions unconscionable and unenforceable. *See Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *Cooper v. OC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1290 (D. Ariz. 2007); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. 2004) (concluding provision preventing right to proceed through a class action or as a private attorney general were both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) (arbitration clause in-

volving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable); *State Ex Rel. Dunlap v. Berger*, 567 S.E.2d 570, 576 (Fla. Dist. Ct. App. 1998).

The South Carolina Supreme Court has stated that it will not enforce this type of arbitration clause. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." *Bazzle v. Green Tree Financial Com.*, 569 S.E.2d 349, 361 (S.C. 2002) (*rev'd on other grounds*). Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together.

The class action and representative capacity suit prohibitions in the Century BMW arbitration agreement are contrary to the "strong public policy reasons" behind the enactment of the Dealers Act and contrary to the Dealers Act's purpose of "punishing acts that adversely affect the public's interest." *Simpson*, 644 S.E.2d at 671. I, therefore, find that the terms of the arbitration agreement are oppressive and violative of public policy and statutory law.

CONCLUSION

Like the arbitration agreement at issue in *Simpson*, there was an absence of meaningful choice by the Wattses in entering into the Century BMW arbitration agreement. Additionally, the Century BMW arbitration agreement's attempt to take away statutory rights under the Motor Vehicle Dealers Act are one-sided and violative of statutory law. I therefore find that the Century BMW arbitration agreement is unconscionable and unenforceable.

Based upon the foregoing, the Motion to Compel Arbitration filed by Century BMW is denied.

AND IT IS SO ORDERED.

172 (2)

No. 10-315

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In The
Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully submits that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in this case should be denied.

OPINIONS BELOW

The opinions below are as set forth by Petitioner.

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a) and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) as contended by Petitioner, because:

1. Petitioner is in default in the court below; and

2. the South Carolina Supreme Court did not decide and was not asked to decide the issue of federal preemption; and

3. the issue of preemption, even if preserved, is inapplicable.

STATUTORY PROVISIONS INVOLVED

In addition to 9 U.S.C. § 2 cited by Petitioner, also involved are the following:

S.C. Code Ann. § 56-15-40. Specific acts deemed unfair methods of competition and unfair or deceptive

acts or practices; Office of Administrator; appointment of personnel; enforcement.

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

S.C. Code Ann. § 56-15-110. Suits for damages.

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common please and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

(3) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damaged not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States

antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C. § 16).

S.C. Code Ann. § 56-15-130. Contracts in violation of chapter shall be void.

Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

S.C. Code Ann. § 37-2-307. Notice of closing fees on motor vehicle sales contract; registration fees.

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

STATEMENT

This action was initiated on August 29, 2006. Respondent alleges that Petitioner was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et. seq.* and did engage in one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs;

b. failed to individually register annually with the Department of Consumer Affairs;

c. charged illegal "administrative fees" in excess of the amount for which it registered;

d. failed to disclose the illegal "administrative fees" on sales contracts;

e. charged illegal "administrative fees" in excess of their costs;

f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price; and

h. created a closing procedure to illegally add "administrative fees."

Respondent contends that the conduct of the Petitioner violates the South Carolina Dealer's Act. (S.C. Code Ann. § 56-15-10).

Petitioner filed a motion to compel arbitration, claiming arbitration was required by an agreement under which the Respondent waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by the trial court in an order dated March 10, 2008. (Pet 16a). The order properly concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling

authority" for the motion. (Pet 18a). Further, as reflected in the order, the motion was decided wholly on state law grounds.

On March 12, 2008, the Petitioner filed a notice of appeal to the South Carolina Court of Appeals. Once again, the issues presented were primarily state issues. As set forth by appellant/petitioner, the statement of issues on appeal to the South Carolina Supreme Court was as follows:

I. Did the trial court err in denying the Appellant's motion to compel arbitration when the court violated the federal and South Carolina policies favoring arbitration?

II. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the arbitration agreement unenforceable despite the Wattses' undisputed opportunity to read the agreement?

III. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement unconscionable?

IV. Did the trial court err in denying the Appellant's motion to compel arbitration when it found Ms. Watts lacked meaningful choice in agreeing to arbitrate?

V. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement was a contract of adhesion?

VI. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement contained oppressive, one-sided terms that no reasonable person would make or accept?

Petitioner's only possible mention of the Federal Arbitration Act was in passing when Petitioner asserted that the trial court violated federal policy favoring arbitration by resolving doubt against arbitration, Pet. S.C. C.A. Brief. 11. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued its decision wherein it specifically recognized the federal policy in favor of arbitration (Pet 4a). Of significance, the issue of federal preemption of South Carolina law was never raised by the Petitioner. The South Carolina Supreme Court held, wholly on state law grounds,[1] that the provision of the arbitration agreement relied upon by Petitioner was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and

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[1] The order denying the Petition for Rehearing confirms that the South Carolina Supreme Court opinion was "wholly based on state law grounds." (Pet 15a).

expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable... We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is

violative of public policy, statutory law, or provisions of the Constitution).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Petitioner filed a Petition for Rehearing pursuant to South Carolina Appellate Court Rule 221. Specifically, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. The Petition for Rehearing did not contend that the South Carolina Supreme Court overlooked the preemption argument now raised by Petitioner.[2] Rather, the points raised by Petitioner related to 1) the supposed inconsistency between the opinion and the case of *Stolt-Nielson S.A. v. Animalfeed International Corp.*; 2) whether the South Carolina Legislature intended to created a non-waivable right to bring a class action under the Dealers Act and 3) whether arbitration

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[2] The Petitioner argues that *Stolt-Nielson, S.A. v. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010) is inconsistent with the South Carolina Supreme Court opinion. Petitioner now argues that the FAA preempts South Carolina law. Petitioner cited three South Carolina cases addressing this proposition. These cases held that the FAA did not preempt South Carolina's procedural rule on appealability of arbitration, that the FAA did preempt a notice provision of the South Carolina Arbitration Act and did preempt a state statute precluding arbitration held outside of South Carolina "under the circumstances presented." None of these cases address whether South Carolina public policy involved in the present case is preempted by the FAA. There is not any argument advanced by Petitioner below that the public policy defense does not qualify as a valid ground for revocation of contracts under the exception to 9 U.S.C. § 2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract."

should be required for causes of action for civil conspiracy and declaratory judgment. At no time did the Petitioner raise the very applicable 9 U.S.C. § 2. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing stating:

> We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State.

On June 9, 2010 the South Carolina Supreme Court issued a remittitur to the trial court which became effective on June 24, 2010. Under South Carolina Rules of Civil Procedure, 12(a), Petitioner's answer was required fifteen days after notice of the South Carolina Supreme Court's action denying rehearing and remitting the case. Petitioner did not answer the complaint by July 9, 2010, Respondents filed an affidavit of default, and the Clerk of Court entered default on August 10, 2010. On September 1, 2010, Petitioner filed a Petition for a Writ of Certiorari to this Court and on September 3, 2010 Petitioner filed in the trial court a motion to set aside the entry of default below. As of the present date Petitioner is still in default.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner Century BMW's Petition for Writ of Certiorari to this Court should be denied for three reasons: 1) No justiciable case or controversy exists in this matter as a result of Petitioner being in default; 2) Petitioner has clearly failed to preserve and the South Carolina Supreme Court did not address the federal preemption issue for an appeal to this Court; and, 3) it is the longstanding policy of the United States Supreme Court and Congress to permit courts to void arbitration contracts based on state law.

A. No justiciable case or controversy exists in this matter because Petitioner remains in default.

The Petitioner is in full default in the case below. As set forth above, Petitioner's response to the complaint was due fifteen days after notice of the South Carolina Supreme Court's Opinion affirming the denial of the motion to arbitrate, but petitioner defaulted. This fact was made to appear by affidavit and the Clerk of Court entered default. This is a ministerial act which a clerk of court is required to perform, and the court's entry of default is thus proper. *Stark Trust Co., Inc. v. Superior Constr. Corp.*, 602 S.E.2d 99 (S.C. App. 2004). The Petitioner has now moved to set aside the entry of default but no relief has been granted. Accordingly, at the present time Petitioner is in default and under South Carolina law a defaulting party is deemed to have admitted the truth of plaintiff's allegations and to have conceded liability. Moreover, after default, the trial court may proceed as appropriate to enter judgment. *Roche v.*

Young Bros., Inc., of Florence, 504 S.E.2d 311 (S.C. 1998).

Since Petitioner is in default in this case, no justiciable case or controversy exists which would allow Petitioner the requisite standing to petition this Court for A Writ of Certiorari. For this reason Respondents respectfully submit that the Petition herein should be denied.

B. The South Carolina Supreme Court never addressed the issue of federal preemption nor did the Petitioner properly present it.

The issue upon which Petitioner seeks review here was clearly not addressed by the South Carolina Supreme Court, nor was it raised. Petitioner has not met the burden of showing the preemption issue was properly presented below.[3]

In the petition herein Petitioner does not, as required by Rule 14(g)(i), specify the stage in the proceeding the issue was raised in the court of first instance. This being so, the issue is not appropriate for appellate review under South Carolina law which provides that:

> an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review... Moreover, an objection must

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[3] When the highest state court is silent on a federal question it is presumed that the issue was not properly presented. *Adams v. Robertson*, 520 U.S. 83, 86 (1977).

be sufficiently specific to inform the trial court of the point being urged by the objector. *Wilder Corp. v. Wilke*, 497 S.E.2d 731 (S.C. 1998).

The Petitioner apparently contends that the preemption issue upon which it now seeks review was raised in its brief to the South Carolina Supreme Court by arguing that the trial court order "violated the federal policy favoring arbitration," (Pet 4) and on petition for rehearing by contending that "*Stolt Nielson* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration." (Pet 5).

Petitioners incorrectly argue that they properly raised the pre-emption issue by their contention that the Order on appeal violated federal policy favoring arbitration. This contention, however, in no way raised the issue presented herein. Moreover, the fact that no citation to 9 U.S.C. § 2 and no specific arguments as to the preemption law were made below, as are made in the petition herein, undermines the present assertion that Petitioners presented the issue. The argument, actually made for the first time on petition for rehearing was that, the South Carolina Supreme Court opinion was "inconsistent with" *Stolt-Nielson*. That does not clearly present the preemption argument.

Even so, raising the issue for the first time on Petition for Rehearing renders the issue inappropriate for review under South Carolina law. *Kennedy v. South Carolina Retirement System*, 564 S.E.2d 322 (S.C. 2001) makes clear that an argument not presented on the appeal and therefore not considered

by the court is not proper for consideration when deciding whether to grant a petition for rehearing.

As shown above, Petitioner never presented any preemption issue in the trial court, although the main principles raised by preemption law clearly existed at the time the case was brought. Neither did Petitioner properly raise, with fair precision and in due time, the preemption issue in their brief to the South Carolina Supreme Court or in their Petition for Rehearing. Paraphrasing language set forth in *Adams v. Robertson*, 520 U.S. at 87-88 (1997):

> Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal [preemption] claim before the [South Carolina] Supreme Court, or to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.[4]

In order to reach the merits here, another question which this Court would have to address is whether the determinations of the South Carolina Supreme Court qualifies as a valid ground under 9 U.S.C. §2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." Further, this question regarding the court's right to invalidate arbitration provisions under

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[4] Policy considerations and principles of comity along with practical reasons counsel strongly in favor of requiring a federal challenge be, with fair precision and in a timely manner, presented first to the state court. *Webb v. Webb*, 451 U.S. 493, 499-501 (1981).

9 U.S.C. §2 is also an issue which was never preserved because it was never presented below and never decided below. Because this question was not presented below and because this question also is not set forth in the questions presented for review, it is respectfully submitted that this issue should not be considered. *Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (A questions which is merely "complimentary" or "related" to the question presented in the petition for certiorari is not "fairly included therein."); *Andrew v. Louisville & N. R. Co.*, 406 U.S. 320 (1972).

For this reason it is respectfully submitted that the petition herein should be denied.

C. It is the longstanding policy of the United States Supreme Court and Congress to allow courts to void arbitration contracts based on state law defenses, which includes agreements in violation of public policy.

Contrary to the Petitioner's argument, the decision of the South Carolina Supreme Court did not hold that "notwithstanding the Federal Arbitration Act" state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. Rather, the opinion of the South Carolina Supreme Court narrowly addressed only a single provision of a specific contract which violates Chapter 15 of Title 56 of the South Carolina Code (Dealers Act).

As the opinion makes clear, the provision of the contract at issue violates the clearly enunciated legislatively enacted public policy of South Carolina.

This does not mean, and the court opinion below held, that anti-class action arbitration agreement clauses, across the board, are prohibited, or can be prohibited under state law. The opinion, in fact, is in accord with the accepted proposition under 9 U.S.C. § 2 which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Courts are allowed to consider contract defenses which are generally applicable to all state law contracts, such as the contract being violative of public policy. *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 686–687 (1996). Under South Carolina law it is clearly long- established that individuals may never enter contracts in violation of the expressed public policy of the State, *Dill v. Sovereign Camp*, 25 S.E.2d 285 (S.C. 1943), and that contracts in contravention of "public policy" as is found in statute, as here, and the constitution and judicial decisions of this state are void, *White v. J. M. Brown Amusement Co.*, 601 S.E.2d 342 (S.C. 2004). There is no debate that the "violation of public policy defense" is generally applicable to all contracts in South Carolina. In fact, the decision below

enunciates this principle very clearly and is now the law of the case as to this issue. (Pet 10a).

It is also noteworthy that the action here is truly one of state law and not a true class action with the normal requirements of Rule 23. The case is brought under a specific state statute, limited to Dealers Act cases, with the requirements for bringing the action for the benefit of the whole being that the action is one of common or general interest to many persons, or when the parties are numerous and it is impractical to bring them all before the court. Thus, the anti-class action provision of the arbitration agreement[5] is not implicated in true class actions and those brought on non Dealer Act causes of action. The enforceability is only implicated in case of a contract which violates the legislatively declared public policy as set forth in the Dealers Act. Contrary to Petitioner's contention, the state law rule invalidating contracts against public policy is not aimed specifically at dispute resolution agreements but instead covers all contracts which are against public policy of South Carolina as enunciated in its statutes, constitution and judicial decisions.

The South Carolina Supreme Court Opinion determined that the provision of the arbitration agreement violates South Carolina legislatively

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[5] This provision also prohibits "claimant action in court or through arbitration," and if enforced would not allow vindication of any claim at all. This is unlike the *AT&T Mobility* case where the question presented was whether the FAA preempts conditioning enforcement of an arbitration agreement when those procedures are not necessary to insure that the parties are able to vindicate their claims. *AT&T Mobility, LLC v. Concepcion*, No. 09893 *(cert. granted* May 24, 2010).

enacted public policy. The opinion also held that courts in South Carolina will not enforce contract provisions in violation of public policy. (Pet 9a-10a). Both of these determinations are based solely on state law. Both of these determinations are now binding upon all parties both as the law of the case and as precedent. *Ulner v. Ulner*, 369 S.C. 486, 632 S.E.2d 858 (2006); *Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville*, 158 S.E.2d 185 (S.C. 1967). Moreover, these are wholly state law determinations which are not proper for consideration here.

For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

On April 27, 2011, this Court issued its decision in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, holding that the Federal Arbitration Act (FAA) preempts any state-law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." Slip op. 9. The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. Like the rule in *AT&T Mobility*, the rule at issue here invalidates a prohibition on class arbitration contained in an arbitration agreement on the ground that it is "unconscionable or unenforceable as against public policy." *Id.* at 7. And like the rule in *AT&T Mobility*, the rule at issue here, although it "does not *require* classwide arbitration," *id.* at 12, contravenes the "overarching purpose" of the

FAA: *viz.*, "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 9. In so doing, the rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Ibid.*

Because the lower court's rejection of petitioner's preemption argument cannot be reconciled with this Court's reasoning in *AT&T Mobility*, the Court should grant the petition for certiorari, vacate the judgment below, and remand the case for further consideration in light of *AT&T Mobility*.

Respectfully submitted.

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v.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Petitioner, in its Supplemental Brief, argues that the decision in *AT&T Mobility, LLC v. Concepcion*, No. 09-893, is indistinguishable from this case, and that the lower court's rejection of Petitioner's pre-emption argument cannot be reconciled with *AT&T* case. The issue in AT&T was whether the Federal Arbitration Act (FAA) preempted "California's ***rule*** classifying most collective-arbitration waivers in consumer contracts as unconscionable." *AT&T*, p. 5 (emphasis added). The California rule was a judicially created rule set forth in *Discover Bank v. Superior Court*, 36 Cal 4th 148, 113 P.3d 1100 (2005).

In *AT&T*, the majority did not go so far as to preempt a State's statutorily-mandated, substantive right, which is the issue in this case. The South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief." The South Carolina Supreme Court held that the Legislature had specifically recognized the need for consumer protection with regard to automobile dealers:

> The purpose of the Dealers Act is consumer protection....Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (2010), reh'g denied (June 9, 2010). The Court continued:

> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a **non-waivable right** to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (emphasis added). The *AT&T* case only involved a judicial rule stating that generally, class action waivers were unconscionable. This case involves a substantive right allowing a person to "sue for the benefit of the whole" as expressly provided by a South Carolina statute. Is it the Supreme Court's opinion that the FAA can preempt a consumer's

substantive right conferred by a South Carolina state statute?

A state's statutory laws become part of, and are incorporated in, every contract. See, e.g., *Barnitz v. Beverly*, 163 U.S. 118, 127, 16 S. Ct. 1042, 1045, 41 L. Ed. 93 (1896) (stating that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it). Here, there are perceived conflicting provisions: a right under the Dealers' Act, S.C. Code Anno. § 56-15-110, which provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief" and a prohibition against class actions in the arbitration agreement. The South Carolina Supreme Court specifically found that the right to a group or class action was "a non-waivable right" under the Dealers Act. *Herron v. Century BMW,* 387 S.C. 525, 536, 693 S.E.2d 394, 400. The *AT&T* decision cannot be said to have eradicated the protection of a statutory, non-waivable right that is not limited solely to arbitration, but applies to any proceeding involving the Dealers Act.

Also, as Justice Thomas noted in a separate opinion in the *AT&T* case, if there is a defect in the formation of the arbitration agreement, the agreement is not enforceable. The conflict between the South Carolina statute and the arbitration provision creates a defect in the formation of the agreement because the agreement attempts to force a waiver of a non-waivable right.

Furthermore, there is no justiciable case or controversy in this matter because the Petitioner is in full default in the case below. An entry of default has been entered, and while Petitioner has moved to set

aside the entry of default, no relief has been granted. As the defaulting party, Petitioner has admitted all allegations of the complaint and conceded liability, and there is no justiciable case or controversy to provide Petitioner standing to petition for A Writ of Certiorari.

Therefore, Respondents submit that the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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Stolt-Nielsen, S.A. v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) 2, 4, 5

Wetzel v. *Woodside Development Ltd. Partnership*, 615 S.E.2d 437 (S.C. 2005) 6

Constitution and statutes:

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Federal Arbitration Act, 9 U.S.C. 1-16 ..... 1, 2, 3, 4

9 U.S.C. 2 (§ 2) 4

South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009) 3, 4

In the Supreme Court of the United States

No. 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE PETITIONER

Respondents do not seriously dispute that the question presented in this case is materially identical to that presented in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893 (to be argued Nov. 9, 2010): *viz.*, whether the Federal Arbitration Act (FAA) preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement. Respondents instead offer two reasons why that question is not properly presented here. Those reasons are entirely illusory, and the decision in *AT&T Mobility* will have a direct and potentially outcome-determinative effect on the resolution of this case. The petition for certiorari should therefore be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

1. As explained at greater length in the petition, this case presents a materially identical question to the question presented in *AT&T Mobility*, because the South Carolina Supreme Court held that state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. See Pet. 6-8. That state-law rule, like the one at issue in *AT&T Mobility*, is preempted by the strong federal policy, embodied in the FAA, of "ensur[ing] that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen, S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks and citation omitted).

Respondents attempt to distinguish this case from *AT&T Mobility* only in a single footnote, in which they argue that the relevant provision of the arbitration agreement here differs from the relevant provision in *AT&T Mobility*. See Br. in Opp. 16 n.5. That contention, however, rests on a blatant misquotation of the arbitration agreement. Far from "prohibit[ing] 'claimant action in court or through arbitration,'" *ibid.*, the relevant provision of the arbitration agreement merely prohibits parties from "bring[ing] or participat[ing] in any class action or *multi*-plaintiff or claimant action in court or through arbitration." S.C. C.A. App. 1100 (emphasis added). It is therefore simply wrong to say, as respondents do, that the provision "would not allow vindication of any claim at all," Br. in Opp. 16 n.5; the provision prohibits only *class* (or other multi-claimant) litigation. And in that respect, the provision is indistinguishable from the provision at issue in *AT&T Mobility*, which provides that "class arbitrations and class actions are not permitted." Pet. App. at 57a, *AT&T Mobility*, *supra*. Because there is no legal or factual basis for distinguishing this

case from *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.[1]

2. Respondents contend (Br. in Opp. 10-14) that the preemption question is not properly presented in this case for two reasons: first, because the preemption argument was not adequately preserved below, and second, because petitioner is in default in proceedings on remand. Both of those reasons are invalid.

a. As noted in the petition, petitioner consistently argued before the lower courts that it would violate the strong federal policy in favor of arbitration to invalidate the prohibition on class arbitration under state law: in other words, that any state-law basis for invalidating that prohibition would be preempted. See Pet. 4. Even before the trial court, petitioner contended that "[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements," Mem. in Support of Mot. to Compel Arb. 4 (internal quotation marks and citation omitted), and that "South Carolina courts give due regard . . . to the federal policy favoring arbitration," Reply Mem. in Support of Mot. to Compel Arb. 1 n.1 (internal quotation marks and citation omitted). And in its brief before the South Carolina Supreme Court, petitioner unambiguously contended that the trial court's

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[1] Respondents seemingly contend (Br. in Opp. 16) that, to the extent that they are pursuing claims under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009), this case does not involve a "true" class action. That is a bewildering contention, because the Dealers Act "expressly provide[s] plaintiffs with the right to bring class action lawsuits"—as the South Carolina Supreme Court noted in holding that "any contract prohibiting a class action suit [for violations of the Dealers Act] violates our State's public policy and is void and unenforceable." Pet. App. 9a, 10a.

holding that the prohibition on class arbitration was unconscionable under state law "violated the federal policy favoring arbitration." Pet. S.C. C.A. Br. 11; see *id.* at 1 (contending, in first question presented, that the trial court "violated the federal and South Carolina policies favoring arbitration").

Respondents do not dispute, moreover, that petitioner raised the preemption argument as its primary argument in its petition for rehearing in the South Carolina Supreme Court. See Pet. for Reh'g 3-7; cf. *id.* at 3 (contending that "[t]he FAA clearly preempts South Carolina law, as this Court construed it"); Return to Pet. for Reh'g 1-2 (responding to preemption argument); Reply in Support of Pet. for Reh'g 3 (renewing contention that "[t]he FAA, as *Stolt-Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act").[2] Instead, respondents merely contend (Br. in Opp. 8-9, 12-13) that petitioner's preemption argument was an improper basis for rehearing.

As a preliminary matter, even if petitioner had not raised its preemption argument at earlier stages of the litigation, but see pp. 3-4, *supra*, petitioner would have been thoroughly justified in doing so for the first time in its petition for rehearing. That is true both because the South Carolina Supreme Court had invalidated the prohibition on class arbitration on a novel state-law ground that was neither adopted by the trial court nor advanced

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[2] Respondents contend (Br. in Opp. 9, 12, 13-14) that petitioner somehow forfeited its preemption argument because petitioner did not cite 9 U.S.C. 2 in its petition for rehearing. It was hardly necessary for petitioner to do so, however, in light of its unambiguous assertions that the FAA preempts state law—not least because 9 U.S.C. 2 is only one of numerous provisions in the FAA embodying the federal policy in favor of arbitration. See Pet. 7.

by respondents, see Pet. 4-5, and because petitioner was primarily relying on *Stolt-Nielsen*, a decision of this Court that postdated the South Carolina Supreme Court's decision, see Pet. 5. But in any event, the South Carolina Supreme Court plainly thought that the preemption argument had been properly preserved, because, in denying the petition for rehearing, it rejected that argument on the merits—albeit in dismissive fashion. See Pet. App. 15a (stating that *Stolt-Nielsen* was "distinguishable on the law and the facts"). Because petitioner's preemption argument was both raised and passed upon below, there is no basis for concluding that the argument has been forfeited.

b. Equally meritless is respondents' contention (Br. in Opp. 11) that there is "no justiciable case or controversy" because petitioner is in default in proceedings on remand. As respondents acknowledge, proceedings are ongoing before the trial court, see *id.* at 10—and that is sufficient to ensure that the question presented to this Court is not moot for Article III purposes.

We add only that respondents' account of proceedings below is seriously misleading. As respondents omit to mention, when petitioner appealed the trial court's initial ruling on its motion to compel arbitration, the parties agreed to stay further proceedings in the trial court for the "duration of [the] appeal." Mot. to Stay 1. Out of an abundance of caution, after the South Carolina Supreme Court denied petitioner's petition for rehearing, petitioner filed a motion to continue the stay pending the filing of its petition for certiorari in this Court. See Mot. to Continue in Place the Stay. Although the stay remains in effect (and petitioner's motion remains pending), respondents unexpectedly took the position that petitioner was obligated to file an answer to the complaint—and, on that basis, filed a request for entry of default.

Under South Carolina law, the entry of default is a "ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party," and the validity of the default is subsequently litigated by means of a motion to set aside the default. *Stark Truss Co.* v. *Superior Constr. Corp.*, 602 S.E.2d 99, 102 (S.C. Ct. App. 2004). Critically, "while a clerk may make an *entry* of default, a judge is required to enter a default *judgment*." *Wetzel* v. *Woodside Dev. Ltd. P'ship*, 615 S.E.2d 437, 439 n.2 (S.C. 2005). Consistent with that practice, the clerk of the trial court entered a default and petitioner subsequently filed a motion to set aside the default, which is pending. Under the circumstances, it is exceedingly unlikely that the trial court will deny the motion and enter judgment in respondents' favor.

In any event, the salient fact is that no final judgment has yet been entered. Because there is therefore a live issue whether the underlying dispute between the parties should be resolved in court or in arbitration, this Court has jurisdiction to consider the question presented. And because that question is materially identical to the question presented in *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.

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The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, and then disposed of accordingly.

Respectfully submitted.

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